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Taxpayer is a limited liability partnership that files a Form 1065, U.S. Return of Partnership Income, on a taxable year ended September 30<sup>th</sup> fiscal year basis. Taxpayer uses an overall cash method of accounting.

Taxpayer paid employee compensation costs during the Taxable Year in the process of entering into an office space lease with an initial term of 20 years. Taxpayer intended to elect to capitalize the employee compensation costs that were otherwise deductible pursuant to § 1.263(a)-4(e)(4)(iv).

Taxpayer engaged Tax Professional to prepare the Form 1065 return for Tax Year, including extension requests if necessary. Tax Professional provided Taxpayer a draft copy of the return for review prior to the original due date of the return for the Taxable Year, Date A. The draft copy of the return reflected the election to capitalize the employee compensation costs pursuant to § 1.263(a)-4(e)(4)(iv).

Because all of the information necessary to file a complete and accurate return would not be available by Date A, Tax Professional prepared Form 7004, Application for Automatic Extension of Time to File Certain Business Income Tax, Information, Other Returns, for the Taxable Year. Tax Professional believed the Form 7004 had been electronically filed with the Service on Date B.

On Date D, Tax Professional provided draft Schedules K-1 to Taxpayer for delivery to its partners. Taxpayer began distributing the Schedules K-1 to some partners on Date E.

On Date F, Tax Professional learned that the Form 7004 had not been timely filed due to a clerical error. Tax Professional notified Taxpayer the following business day, Date G, 2015.

If the extension request had been timely filed, the due date for the return for the Taxable Year would have been Date C.

Taxpayer electronically filed the return for the Taxable Year on March 12, 2015. The return reflected the election to capitalize the employee compensation costs under § 1.263(a)-4(e)(4)(iv).

Taxpayer is requesting an extension of time to make an election under § 1.263(a)-4(e)(4)(iv) to capitalize the employee compensation costs to comply with the within the timeframe proscribed under § 1.263(a)-4(e)(4)(iv) .

### **APPLICABLE AUTHORITY AND ANALYSIS**

Section 1.263-4(e)(1)(i) provides, in relevant part, that an amount is paid to facilitate the acquisition or creation of an intangible if the amount is paid in the process of investigating or otherwise pursuing the transaction. Whether an amount is paid in the process or investigating or otherwise pursuing the transaction is determined based on all of the facts and circumstances.

Section 1.263(a)-4(e)(4)(i) provides that for purposes of this section employee compensation (within the meaning of §1.263(a)-4(e)(4)(ii)), overhead and de minimis costs (within the meaning of §1.263(a)-4(e)(4)(iii)) are treated as amounts that do not facilitate the acquisition or creation of an intangible.

Section 1.263(a)-4(e)(4)(iv) provides that a taxpayer may elect to treat employee compensation, overhead or de minimis costs paid in the process of investigating or otherwise pursuing a transaction as amounts that facilitate the transaction and provides the time and manner for making the election. Specifically, §1.263(a)-4(e)(4)(iv) provides, in relevant part, that the election is made separately for each transaction and applies to employee compensation, overhead, or de minimis costs, or to any combination thereof. A taxpayer makes the election by treating the amounts to which the election applies as amounts that facilitate the transaction in the taxpayer's timely filed original federal income tax return (including extensions) for the taxable year during which the amounts are paid. In the case of a partnership, the election is made by the partnership, and not by the partners. An election made is revocable with respect to each taxable year for which made, only with the consent of the Commissioner.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make certain regulatory elections. Section 301.9100-1(b) defines a "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-3(a) provides that requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and that granting relief will not prejudice the interests of the government. See *also* § 301.9100-3(b) and (c).

Information, affidavits, and representations submitted by Taxpayer and Tax Professional explain the circumstances that resulted in the failure to timely file a valid election. The information establishes that Taxpayer reasonably relied on Tax Professional, a qualified tax professional who failed to make the election as a result of an inadvertent error, and that the request for relief was filed before the failure to make the election was discovered by the Internal Revenue Service. See §§ 301.9100-3(b)(1)(i) and (v).

## CONCLUSION

Based solely on the facts and information submitted, including the representations made, we conclude that Taxpayer has shown it acted reasonably and in good faith, and granting relief will not prejudice the interests of the government, satisfying the requirements of § 301.9100-3. Accordingly, an extension of time is granted under § 301.9100-3, until 45 days from the date on this letter, for Taxpayer to make the election under § 1.263(a)-4(e)(4)(iv) for the Taxable Year by refiling the return with a copy of this letter attached. Alternatively, if Taxpayer is filing its return electronically, Taxpayer may satisfy the requirement of attaching a copy of this letter by attaching a statement to its return that provides the date and control number of the letter ruling.

We express no opinion as to whether the costs the Taxpayer seeks to elect to capitalize are eligible to be capitalized under § 1.263(a)-4(e)(4)(iv). In addition, we express no opinion as to the tax consequences of filing the election late under the provisions of any other section of the Code and regulations, or as to the tax treatment of any conditions existing at the time of, or resulting from, filing the election late that are not specifically set forth in the above ruling. For purposes of granting relief under § 301.9100-3, we relied on certain statements and representations made by the Taxpayer and its Tax Professional. However, the Director should verify all essential facts. In addition, notwithstanding that an extension is granted under § 301.9100-3 to file the election, penalties and interest that would otherwise be applicable, if any, continue to apply.

This letter is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Pursuant to the power of attorney on file in this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Andrew M. Irving  
Senior Counsel, Branch 1  
Office of Chief Counsel  
(Income Tax and Accounting)